BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBRA L. ENGLER	)	
Claimant	)	
VS.	)	
	)	
U.S.D. NO. 437	)	Docket Nos. 1,012,280;
	)	1,012,281
Respondent	)	
AND	)	
	)	
KS ASSOC. OF SCHOOL BOARDS	)	
WORKERS COMPENSATION, INC.	)	
Insurance Carrier	)	

ORDER

Claimant appeals the October 22, 2003 Order entered by Administrative Law Judge (ALJ) Bryce D. Benedict. On November 21, 2003, the Appeals Board (Board) placed this matter on its summary calendar for a determination without oral argument.

APPEARANCES

Claimant appeared by John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by Anton C. Andersen of Kansas City, Kansas.

ISSUES

In an Order dated October 22, 2003, Judge Benedict made the following findings and conclusions:

> The [r]espondent shall respond to the [c]laimant's request for production once the [c]laimant properly designates a reasonable time and place for the inspection of the documents and/or things, except: the medical manager documents identified in item #4(n) are privileged, as are any surveillance/audio tapes identified in item #10; items #11 and 12 need not

be produced as this request is overbroad, and item #14 is burdensome and need not be produced. [1]

Claimant appealed, listing the issue as: "Whether the items requested in claimant's motion to produce not already ordered to be provided, should be produced." [2]

Respondent contends the medical manager documents identified in item number 4(n) and the surveillance/audio tapes of claimant identified in item number 10 "encompass 'work product' or trial preparation materials 'prepared in the anticipation of litigation or for trial by or for another party or by or for that other party's representative[']" [3] and "are subject to the attorney-client privilege to the extent they constitute confidential communications between counsel and agents or representatives of [r]espondent or insurance carrier. " [4] With respect to items number 11 and 12 respondent contends the request is overbroad. With respect to item number 14 respondent objects that this request "would be onerous and unduly burdensome." [5] In addition, respondent contends that "[t]he pertinent information to establish [c]laimant's average weekly wage and other related income issues has [otherwise] been ordered produced, and will be produced by [r]espondent." [6]

Respondent further argues that Judge Benedict's Order is a preliminary hearing order and, as the ALJ did not exceed his jurisdiction and the appeal does not otherwise raise one of the issues contained in K.S.A. 44-534a which are deemed jurisdictional, the Board does not have jurisdiction to review the ALJ's Order at this stage of the proceedings.[7]

Claimant counters that the portion of the ALJ's October 22, 2003 Order ruling on claimant's request for production is not a preliminary hearing order. Instead, it is a discovery order. And although the Board has ruled such orders are interlocutory, the

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[1] Order (Oct. 22, 2003).

[2] Petition for Review (filed Oct. 27, 2003).

[3] Respondent's Brief in Opposition to Claimant's Petition for Review at 5 (filed Nov. 19, 2003).

[4] *Id.* at 6.

[5] *Id.* at 8.

[6] *Id.* at 8 (FN 1).

[7] *See* K.S.A. 44-551.

Board should treat this Order as final under K.S.A. 44-551 pursuant to the rule announced by the Kansas Court of Appeals in *Skahan*[8] and followed by the Board in *Rhodeman.* [9]

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The portion of Judge Benedict's Order that rules on claimant's request for production is not a preliminary hearing order. It is a discovery order.

In *Rhodeman*, the Board treated a discovery order as final for purposes of review. The Board said:

> Before reaching the merits of claimant's argument, the Board must first determine whether it has jurisdiction to consider this appeal. K.S.A. 1998 Supp. 44-551 grants the Board jurisdiction to review the following:
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> > All **final** orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. [Emphasis added.]
>
> The limitation to "final" orders was not in the original 1993 version of K.S.A. 44-551. That term was added in 1997 after the Kansas Court of Appeals had ruled that the Board's jurisdiction included the right to review such orders as an appointment of a neutral physician and held that the Board's jurisdiction was not limited to review of final orders or awards. [10] We find no subsequent appellate decision which defines "final" order in this specific context of this Board's review. The term "final" is, of course, defined as it relates to review by the Kansas Court of Appeals and this is a logical source for a definition.
>
> Generally, a decision or order is final only when it resolves all issues between the parties and reserves no further question for future action. But the Kansas Court of Appeals has also recognized an exception to this general rule in certain cases where there is no other effective means to review the decision. The Court states three criteria which also make an order a final order. The order may be final even if it does not resolve all issues between the parties if the order (1) conclusively determines the disputed question, (2) resolves an important issue completely

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[8] *Skahan v. Powell,* 8 Kan. App. 2d 204, 653 P.2d 1192 (1982).

[9] *Rhodeman v. Moore Management*, No. 234,890, 1999 WL 1008029 (Kan. WCAB Oct. 12, 1999).

[10] *Winters v. GNB Battery Technologies*, 23 Kan. App. 2d 92, 927 P.2d 512 (1996).

> separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgement. [[11]]
>
> In our view, the current Order satisfies these three criteria. The Order conclusively determines whether respondent is entitled to have production of the records in question. The Order is completely separate from the merits of the action and is effectively unreviewable on appeal after the documents have been produced. The Kansas Court of Appeals has held that sanctions for failure to comply with discovery does not satisfy these three criteria because an order for sanctions is subject to effective review on appeal. [[12]] In fact, most orders can be effectively reviewed. Orders such as that in the *Winters* case, an order for appointment of a neutral physician, decisions regarding terminal dates, admission of evidence, and most other orders can be effectively reviewed in the sense that there remains a remedy. In this case, however, the interest involved is the interest in protecting confidential information not relating to the workers compensation proceeding. Claimant uses, as an example, information relating to one's children used to justify leave under the Family Medical Leave Act. There could be numerous other examples. But once the information is disclosed, there is no remedy. The Kansas Court of Appeals borrowed this definition of final orders from the federal courts. The federal courts have generally not permitted appeal from discovery orders and have instead insisted the parties force the issue to sanctions or contempt charges which can then be reviewed in a later appeal. [[13]] But the workers compensation system does not have the same contempt and sanction options. Appeal of the order itself is the only effective option. The decision should, therefore, be considered final and subject to review. [[14]]

Judge Benedict's Order is an interlocutory ruling on a discovery motion. It does not satisfy the three criteria in *Skahan* because it does not conclusively determine the disputed question and it is not effectively unreviewable on appeal from a final judgment. Although an appeal is a time consuming and cumbersome procedure, claimant is not without recourse should she continue to feel aggrieved following the entry of a final award by the ALJ. A remand is possible should the Board find that the ALJ erred and that the circumstances merit that remedy. The facts in this case are different from *Rhodeman*. In *Rhodeman* the ALJ ordered the production of documents which claimant considered privileged or otherwise not discoverable. Claimant further believed certain portions of the order to be overly broad and unduly burdensome. If the Board had declined to review that order claimant would have had no recourse on appeal to undo the harm, hence the order

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[11] *Skahan* at 206.

[12] *Reed v. Hess*, 239 Kan. 46, 716 P.2d 555 (1986).

[13] *Connaught Lab., Inc. v. SmithKline Beecham P.L.C.,* 165 F.3d 1368, 49 U.S.P.Q. 2d1540 (Fed. Cir. 1999).

[14] *Rhodeman* at 2 and 3.

was effectively unreviewable on appeal from a final judgment. Conversely, in this case the ALJ denied certain discovery requests. That denial is reviewable by the ALJ while the case is ongoing and is thereafter subject to effective review on appeal from a final award.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the October 22, 2003 Order entered by Administrative Law Judge Bryce D. Benedict remains in full force and effect and the appeal by claimant from that Order should be, and is hereby, dismissed.

IT IS SO ORDERED.

Dated this ____ day of January 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent and its insurance carrier
Bryce D. Benedict, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director